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Supreme Court of the United States

OCTOBER TERM, 1951

No. 440

DASHIELL HAMMETT and ALPHAEUS W. HUNTON,
Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES ROTHENBERG
Attorney for Petitioners
25 Broad Street
New York 4, N. Y.

CHARLES HAYDON
Of Counsel for Petitioner Hammett

MARY M. KAUFMAN
Of Counsel for Petitioner Hunton

12 CABB PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

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No. .....

DASHIELL HAMMETT and ALPHAEUS W. HUNTON,
Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Dashiell Hammett and W. Alphaeus Hunton pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit, made October 30, 1951, which affirmed orders of the United States District Court for the Southern District of New York entered July 9, 1951 (80-90)* adjudging petitioners guilty of contempt of court and sentencing each of them to imprisonment for six months.

Opinions Below

The three judges who heard the petitioners' appeal to the Court of Appeals concurred in the result. Judge Frank dissented in part and wrote an opinion. These opinions have not yet been reported, but appear as an appendix to the record.

Statement of the Matter Involved

Several days after this Court upheld the conviction of eleven defendants in the case of *United States* v. *Dennis*,

* All references are to folios in the printed transcript of record on appeal.

et al., 341 U. S. 494, the United States Attorney for the Southern District of New York sent telegrams to each of the eleven defendants directing them to surrender on July 2, 1951, and at the same time sent a similar telegram to Robert W. Dunn, the surety on their bail bonds (96, 97, Exhibit 1). Seven of the defendants appeared and were incarcerated. Four failed to appear. Dunn was ill in the hospital and unable to appear (187).

Judge Ryan immediately issued bench warrants for the four who were missing (94) and, when they failed to appear on the following day, declared their bail forfeited.

At the request of the United States Attorney, Judge Sylvester J. Ryan issued subpoenas requiring the appearance of the bondsman, Robert W. Dunn, and the appearance of Abner Green, Frederick V. Field and the petitioners (97, 100, 101).

Green and Field learned of the issuance of the subpoenas through the press and voluntarily appeared within a few hours. Hunton and Hammett heard or read the news out of town and appeared shortly thereafter (103, 424, 524).

When Field and Green appeared in the courtroom, Judge Ryan ordered Field to the witness stand and directed the United States Attorney to

> "* * * proceed to examine this witness and ascertain what knowledge he has, if any, concerning the present whereabouts of these defendants (Winston, Hall, Thompson & Green, the defendants in the Dennis case who failed to appear) * * * (109).
>
> "* * * you may ask him such questions as you desire which will throw light upon the present or past whereabouts of these defendants who are named fugitives * * *" (109, 113).

Judge Ryan stated the purpose of the inquiry to be as follows:

"The Court is conducting a hearing to determine what if anything is being done by anybody to assist these four men in evading the process of the Court and to discover such information as may be able to give to those who have been entrusted with the execution of the warrants which are outstanding for these four men and to assist them in effecting service of that process of the Court. That, I believe, is in the inherent power of the Court.

"The Court is also conducting an inquiry to determine whether or not the conduct of any individual in connection with the non-appearance of these men and when they were required to appear after their release on bail has been contumacious of the Court and whether anybody is in contempt of the Court as a result of any action they might have taken in any aid or assistance or advice they may have given any of these four men in evading the process of the Court and in committing what I deem to be a contemptuous action.

"Mr. Rabinowitz: [Attorney for Field] Well, I assume then that I will have an opportunity later to address myself to the question of the jurisdiction of the Court.

"The Court: Yes. Now, at the present time, I issued subpoenas for four or five individuals who executed the bonds in these cases. One of these individuals, it has been stated to the Court, is ill and confined to a sanitarium. I so direct that he be not required to appear at this time, because I have no purpose to inter-

fere with the medical care and attention that individual at present is said to be receiving.

"Your position here, counsel, briefly stated, as I see it, is that you do not appear as a party to these proceedings, these present proceedings, and you will not appear as a party to these present proceedings until such time as I begin to determine whether or not this man or these witnesses who have testified are to be held in contempt. * * *"

When counsel sought to determine the legal basis for the inquiry, there occurred the following colloquy:

"The Court: The court is proceeding under the section of the Code that deals with contempts, under the Rules of Criminal Procedure, Rule 42.

"Mr. Rabinowitz: That is the rule under which you are proceeding to hold the witness in contempt. I am inquiring as to the rule under which he was called here in the first place.

"The Court: The court is proceeding under the inherent power of the court to make inquiry into any action which the court deems is calculated to be in contempt of court and which the court deems is a flouting of the court's jurisdiction. * * * The court is also proceeding under the inherent power of any court to conduct an inquiry which will assist in effecting service or process issued by the court." (262, 263).

Judge Ryan directed all exhibits to be treated as Court, and not government exhibits (492).

The only bondsman or surety who executed the bonds which released the four defendants pending their appeal was Robert W. Dunn.

Neither the petitioners nor Field nor Green had signed any bond or recognizance for the appearance of these defendants.

When Judge Ryan undertook his inquiry, the United States Attorney placed before him the four bail bonds signed by the four defendants in question as principal, and by Robert W. Dunn as surety. At the time of posting the bail, Dunn delivered the U. S. Government bearer bonds in the amount of the required bail. The United States Attorney also produced certain documents filed by Dunn when the bonds were given. These consisted of a copy of an "Agreement and Deed of Trust" dated originally September 16, 1946 and amended September 26, 1949, which showed that Field, Green, Hammett, Hunton and Dunn, therein designated as trustees, were accepting loans and gifts—for which certificates of deposit or receipts were to be given—to be employed in posting bail "for the benefit of strikes and all those whose civil rights are threatened or under attack". There was also a statement by Field, Dunn and Hunton, dated November 3, 1949, reciting that they authorized the use of the Government bearer bonds by Robert W. Dunn as collateral security for bail for the persons indicted under the Smith Act.

The bond posted by Dunn in the case of each of the defendants provided (Exhibit 1):

> "Now, the conditions of these recognizances are such that if the said (defendant) shall appear either in person or by attorney in the United States Court of Appeals for the Second Circuit, when such case is reached for argument or when required by law or rule of said United States Court of Appeals and from day to day thereafter in said United States Court of Appeals, until said case is finally disposed of, and shall

abide by and obey all orders made in said case, and shall surrender himself in execution of the judgment sentence appealed from upon such day as the District Court of the United States for the Southern District of New York may direct, if the judgment and sentence appealed from shall be affirmed, and shall appear before the District Court of the United States for the Southern District of New York on such day or days as shall be for a re-trial of the said case, provided the judgment of the District Court of the United States for the Southern District of New York is reversed by the said United States Court of Appeals; and shall not depart the jurisdiction of the District Court of the United States for the Southern District of New York without leave, then this recognizance to be void, otherwise, to remain in full force, virtue and effect.

"And we, the undersigned principal and surety, do hereby STIPULATE, AGREE AND CONSENT, that in case the aforesaid recognizance shall be forfeited, judgment may be entered from the sum set forth in said recognizance and that execution issue thereon according to law."

We respectfully repeat that neither one of the petitioners signed any of these bonds, and it is important to bear the fact in mind since both Judge Ryan and the Appeals Court proceeded on the assumption that the petitioners were "persons who executed the bonds in these cases."

The Testimony

Petitioner Hunton testified that he was a trustee of the bail fund of the Civil Rights Congress; that he did not have in his possession any books, records or documents per-

taining to the bail fund of the Civil Rights Congress (432, 499, 593); that he did not know where such books and records were; that he did not know where any of the fugitives were and had done nothing in any way to aid or abet in their non-appearance or conspire with any one for their concealment or non-appearance in Court (439); and that he had not seen any of the defendants any time after the affirmance of their convictions by this Court (605). He declined to answer questions concerning the operations of the bail fund on the ground of the privilege against self-incrimination.

Petitioner Hammett declined to answer questions concerning his relationship to the bail fund; his knowledge of the defendants, or the contents or whereabout of the books of the bail fund of the Civil Rights Congress, on the ground of the privilege against self-incrimination (527, et seq).

The Judge overruled the plea of self-incrimination and directed them to answer all questions and to produce the books and records of the bail fund of Civil Rights Congress. Upon their failure to comply with these directions, he found them guilty of contempt of Court and sentenced each of them to six months confinement.

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1951. The jurisdiction of this Court is invoked under 28 U. S. Code 1254 (1).

Questions Presented

1. Whether Judge Ryan had constitutional or statutory authority to conduct the inquiry or investigation here in question and to adjudge the petitioners guilty of contempt.

2. Whether petitioners had the right to refuse the production of the books and papers called for by the Judge on the ground that the production of such books and records was subject to a claim of privilege under the self-incrimination clause of the Fifth Amendment.

3. Whether petitioners had the right to refuse to answer the questions put in the inquiry or investigation on the ground that such questions were likewise subject to a claim of privilege under the self-incrimination clause of the Fifth Amendment.

4. Whether petitioners' rights to claim their privilege under the Fifth Amendment were either waived or contracted away by the testimony given by them or by the filing by anyone else of documents in the District Court in connection with the bail in the case of *U. S.* v. *Dennis.*

5. Whether a single sentence for contempt, based upon several categories of acts, should be reversed if it should appear that the finding of contempt with respect to any one of those categories was error either in law or in fact.

Reasons for Allowing the Writ

The pressures and tensions of the times have borne heavily on constitutional rights and privileges, never before questioned. Too frequently are such rights lightly treated in the lower Courts.

The issues on this appeal present questions of constitutional and federal law of profound importance to a bewildered and worried public. They should be settled by this Court. The decision of the Court of Appeals conflicts

with constitutional principles, and the Court of Appeals has so far sanctioned a departure by Judge Ryan from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I

There is no legal sanction for the inquiry in question.

The investigation conducted by Judge Ryan is unprecedented in the history of American jurisprudence. Never before has a Judge conducted an inquiry for the purpose of obtaining evidence as to the whereabouts of convicted defendants who failed to appear for commitment. Never before has a Judge, under threat of contempt, compelled persons to appear before him and testify, under oath, and produce their books and papers in furtherance of such an inquiry.

His inquiry was neither authorized by law nor recognized in practice. There were no named or specified parties. There was no defined or definable area of materiality or relevancy of evidence. There was no privilege of counsel, or opportunity to object to immaterial matter by any one. There were only so called "witnesses" who were required to answer questions and produce records, and upon their failure so to do, they were adjudged guilty of contempt of Court and sent to jail.

The scope of the inquiry was limited solely by the grace of the Judge who conducted it.

This Court's review of the jurisdiction assumed by Judge Ryan is sought in the interests of preserving the basic principles of our government, the vital separation of power between its branches, the due process of law and the funda-

mental liberties guaranteed in our Constitution and, at the same time, preventing the abuse and usurpation, by courts of limited jurisdiction, of powers and functions vested in the executive and administrative bodies of our government.

A. There is no statutory authority for the proceedings in question.

Federal District Courts are neither common law courts, nor courts existing by prescription. Their jurisdiction derives only from the Constitution and the Statutes of the United States (*U. S.* v. *Flories,* 289 U. S. 137).

In *Windsor* v. *McVeigh,* 93 U. S. 274, this Court said, at page 282:

> "All courts (federal), even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief such as legal or equitable; or to transactions of a special character * * *; or to the use of particular process in the enforcement of their judgment. * * * Though the court may possess jurisdiction of a cause, the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot transcend the power conferred by law."

The procedures of a District Court subsequent to judgment in a criminal case require and must have clear and unequivocal statutory authority. (*Wayman* v. *Southard,* 10 Wheat. 1; *Fink* v. *O'Neil,* 106 U. S. 272; *Riggs* v. *Johnson County,* 6 Wall (73 U. S.) 166; *U. S.* v. *Plumer,* 27 Fed. Cas. No. 16,056.)

The only statutory powers vested in a District Court subsequent to such judgment are the following: as to sentence (Federal Rules of Criminal Procedure, Rule 32(a)); as to the form of the judgment (Rule 32(b)); as to pre-sentence investigation (Rule 32(c)); as to the withdrawal of a plea of guilty and setting aside the judgment of conviction (Rule 32(d)); as to the placing of a defendant on probation (Rule 32(e)); as to granting a new trial (Rule 33); as to arresting judgment (Rule 34); as to correcting or reducing a sentence (Rule 35); and as to correcting clerical errors (Rule 36).

In *Fink* v. *O'Neil,* 106 U. S. 272, a civil case, this Court said at page 280:

> "The United States cannot enforce the collection of a debt from an unwilling debtor, except by judicial process. They must bring a suit and obtain a judgment. To reap the fruit of the judgment they must cause an execution to issue. The courts have no inherent authority to take any one of these steps except as it may have been conferred by the legislative department, for they can exercise no jurisdiction except as the law confers and limits it."

It is important to note that Congress did provide the District Court with jurisdiction to entertain proceedings to enforce its judgments in civil suits (Federal Rules of Civil Procedure, Rule 69(a)). But there is no statutory authority in a criminal case for the enforcement of a bench warrant or the execution of its judgment by any such means or in such manner or to such extent as was here undertaken by Judge Ryan.

In *United States* v. *Wright,* 56 F. Supp. 489, 491, 492, the Court said:

> "• • • nor was it any part of the court's function to execute the sentences. That duty was in the marshal and the prison authorities. • • •
>
> "The trial court has jurisdiction only to try cases, to enter sentences and to direct their enforcement, the apprehension of the defendant upon commitment and his imprisonment are matters solely within the duties of other officers of the Department of Justice."

Congress was not unmindful of the possibility that convicted defendants at large on bail might fail to appear for commitment. Rule 46(b) of the Federal Rules of Criminal Procedure gives the Court jurisdiction to declare a forfeiture of bail in such cases.

In view of the foregoing, the absence of a specific statute dealing with the power of a court to take testimony to effectuate the service of a bench warrant in a criminal case indicates Congressional intent to deny that power to the federal courts.

B. Neither the "All Writs" Section of the Statute nor any inherent power of the Court authorizes the jurisdiction assumed by Judge Ryan.

The Court below was of the opinion that Judge Ryan's jurisdiction might be upheld either under (a) the authority of 28 U. S. C. Section 1651, the "All Writs" Section, or (b) the inherent power of the Court to "do all things that are reasonably necessary for the administration of justice, within the scope of their jurisdiction."

Section 1651 provides that Federal Courts

> "• • • may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

But the procedure Judge Ryan followed was neither in aid of jurisdiction, nor agreeable to the usages and principles of law. It is settled law that Section 1651 provides no new jurisdiction for the Courts, but

> "• • • merely makes available to the District Courts all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, but it does not confer or expand the jurisdiction." (*Shimola* v. *Local Board No. 42, Cuyahoga County,* 40 F. Supp. 808; see also *Whitney* v. *Dick,* 202 U. S. 136; *Price* v. *Johnson,* 334 U. S. 266.)

In *U. S.* v. *Wright, supra,* the Court held that the Trial Court's jurisdiction in a criminal case terminated on the entering of sentence and the direction for its enforcement.

In *U. S.* v. *Plumer,* 27 Fed. Cas. No. 16,056, defendant was found guilty of murder, sentenced to be executed and remanded to custody awaiting the execution of sentence. The question before the Court was whether the "all writs" section authorized a Federal Court to grant a writ of error from the judgment of conviction rendered by the same Court. The Court said:

> "Unless the writ is necessary to the exercise of jurisdiction already vested in the circuit court, the power to issue the writ cannot be deduced from that clause (the 'All Writs' Section); but the uniform construction given the provision is that Congress intended to vest the power to issue such 'other writs', in cases where jurisdiction already existed, and not where the jurisdiction was to be acquired. *M'Clung* v. *Silliman,* 6 Wheat. (19 U. S.) 601; *McIntire* v. *Wood,* 7 Cranch (11 U. S.) 506; *Kendal* v. *U. S.,* 12 Pet. (37 U. S.) 624.
>
> "Completed as the proceedings in the case were, the Circuit Court, at the date of this application, has no

> more power over it than if the indictment had never been found." (574)

Here, no case or proceeding was pending before the Court when Judge Ryan called the petitioners to the witness stand. The case of *United States* v. *Dennis,* et al., had been completed for all judicial purposes. Seven of the eleven defendants had been incarcerated. Bench warrants had been issued for the missing defendants, and their bail had been forfeited.

The case of *Wayman* v. *Southard* (10 Wheat. 1), cited by the Court below, was a civil suit. It has no application here, because there the continuing jurisdiction until satisfaction of judgment was predicated upon historic writs and statutory procedures in aid of execution exercised in civil cases.

In *Wayman* v. *Southard* the Court clearly limited its decision to the authority of the Court to issue a Writ of Execution and declared that the "all writs"

> "• • • section provides singly for issuing the writ and prescribes no rule for the conduct of the officer while obeying the writ."

While the issuance of the bench warrant in a criminal proceeding may be analogous to the writ in a civil case and authorized under the "all writs" section, the cited case is no authority for Judge Ryan's action under review. Even in a civil case, the "all writs" section was never deemed to authorize the taking of evidence in aid of the execution or the enforcement of the judgment. In all cases where such ancillary proceedings have been upheld, the courts relied upon specific statutory authority, now codified in Rule 69(a) of the Federal Rules of Civil Procedure.

Furthermore, the writ authorized by the "all writs" section must be "agreeable to the usages and principles of law". (*Riggs* v. *Johnson,* 6 Wall (73 U. S.) 166; *U. S. Bank* v. *Halstead,* 10 Wheat. 51) and this Court has uniformly held that that phrase was intended to embody existing process at the time of the passage of the Judiciary Act and subsequent legislation affecting the forms and procedures of the Federal Courts.

In *Riggs* v. *Johnson,* the Court said at pages 189, 190;

> "Executions it is admitted may be issued by the circuit court, but the power of such courts to issue all other writs necessary to the exercise of jurisdiction is equally clear, with the single restriction that the writ, and the mode of process, must be agreeable to the principles and usages of law. Usages of law and not the common law, it will be observed, are the words of the provision, which doubtless refers to principles and usages of law as known and understood in the state courts at the date of that enactment."

The procedure undertaken by Judge Ryan has never before been exercised or used in a criminal case by any court of law in American jurisprudence.

Mr. Hare, in his Treatise on Discovery (c. 5, Sec. 3, p. 84, ed. 1876) points out that discovery in civil suits after trial was not allowed prior to the statutory authority except as a creditor's suit in equity.

Supplementary proceedings in aid of execution are a substitute for such suit. (*Fox* v. *Capital Co.,* 299 U. S. 105.) Federal criminal courts have no equitable jurisdiction. (*United States* v. *Widen,* 38 Fed. 2d 517.)

Judge Ryan had no inherent power to conduct the inquiry. Federal Courts are not possessed of powers inherent

in Courts existing by prescription or common law. (*Cary* v. *Curtis,* 3 How. 236, 245.)

Inherent powers of a court are derived from immemorial usage. (*McQuigan* v. *D. L. & W. R. Co.,* 129 N. Y. 50.) There is no precedent for Judge Ryan's inquiry or procedure. In *U. S.* v. *Plumer,* 27 Fed. Cas., No. 16,056, this Court said at page 572:

> "Seventy years having elapsed, or nearly so, since our judicial system was organized, the conclusion would seem to be a reasonable one that if there is any foundation for the right claimed to be exercised in this case, some trace of a prior exercise of it, or of a claim of exercise of it in a criminal case, would be found in some supported decision of the circuit or district courts.
>
> " * * * (p. 574) the construction attempted to be given to the clause referred to ('all writs' section) is as unwarranted by its language as it is unsupported by the usages and practices of the circuit courts."

In *McQuigan* v. *D. L. & W. R. Co., supra,* at page 56, the Court said:

> "It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until a very recent period, never in fact had any existence."

C. The inquiry violated the Constitution.

A judicial proceeding is one in which the Court is required to declare the law, discover the facts and adjudicate the rights of litigants.

Under Article III, Section 2 of the Constitution, judicial power extends only to *cases* and *controversies.*

> "To exercise judicial power there must be parties to the controversy, an assertion and a denial; in short, a distinct issue to be determined." (Cooley, *Constitutional Limitation,* 132) see also: *Pacific Railway Commission* v. *Stamford,* 32 Fed. Rep. 241; and *Interstate Commerce Commission* v. *Brinson,* 154 U. S. 447.

In *Aetna Life Insurance Company* v. *Hayworth,* 300 U. S. 227, 240 (1937), the Court ruled the Declaratory Judgment Act constitutional, but only to the extent that "it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial powers extend. It must be a real * * * controversy admitting of specific relief through a decree of conclusive character."

"Judicial power," was described by Justice Frankfurter in *"Power to Regulate Contempts,"* 37 Harvard Law Review 1017 in these words:

> "These limiting conceptions [imposed by the Constitution] may be thus defined: (1) It is the characteristic of the courts to decide and not merely to advise. Their work must be definitive and not consultative. They are an independent organization of government with finality of judgment within their domain and not advisory adjuncts of the executive or legislature. (*Gordon* v. *U. S.,* 117 U. S. 697 (1964).)"

D. The gathering of evidence to apprehend fugitives is a function delegated exclusivly to the executive branch of the Government.

The inquiry conducted by Judge Ryan constituted an invasion of the functions delegated by the Constitution

solely to the executive branch of the Government. The doctrine of the separation of powers into the legislative, executive and judicial branches of the Government, separate and distinct, is rooted in our system of jurisprudence.

Under this system, the Courts must obviously rely upon other departments of government to aid in the administration and enforcement of justice. Appropriately, the entire burden of the proper function of the administration of justice does not rest upon the Court alone.

"The doctrine of the separation of powers", said Mr. Justice Brandeis, dissenting in *Myers* v. *United States,* 272 U. S. 52, 293, "was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power".

An inquiry by courts dedicated to the uncovering of clues leading to the apprehension of criminals and their incarceration has been condemned time and again, rarely with more clarity than by Chief Judge Cardozo of the New York Court of Appeals in *Matter of Richardson,* 247 N. Y. 401, 407 (cited with approval in *In Re Oliver,* 333 U. S. 257). In that case, the New York State Legislature passed a law which charged Justices of the Supreme Court with the duty of acting as a delegate of the Governor in investigating the acts of a public officer. The Court held the statute unconstitutional and said (410-412):

> "The question arose as far back as 1792. An act of Congress required the Circuit Courts of the United States to examine into the pension claims of soldiers and seamen of the Revolution, and to certify their opinion to the Secretary of War with a view to corrective legislation. The judges of the several circuits concurred in a determination that the duty was

not judicial Hayburn's Case, 2 Dall. 409. In 1851 the Supreme Court of the United States considered that determination and approved it, declining jurisdiction under an act not widely different U. S. v. Ferreira, 13 How. (U. S.) 40, 44. There was an opinion by TANEY, C. J., which has become a landmark of the law Gordon v. U. S., 117 U. S. 697; Matter of Sanborn, 148 U. W. 222; Int. Com. Comm. v. Brimson, 154 U. S. 447, 481; Muskrat v. U. S. 219 U. S. 346, 353; Tutun v. U. S., 270 U. S. 568, 576; Liberty Warehouse v. Grannis, 273 U. S. 70, 74. Nowhere has the doctrine thus established been applied more steadily or forcefully than in the courts of New York. Matter of Davies, 168 N. Y. 89; Matter of State Ind. Comm., *supra*. The function of the judges is to determine controversies between litigants. Matter of State of State Industrial Comm. *supra*. They are not adjuncts or advisers, much less investigating instrumentalities, or other agencies of government. Their pronouncements are not subject to review by Governor or Legislature Dinan v. Swig, 223 Mass. 516. They speak 'the rule or sentence.'

"The statute was thus an encroachment upon the independence of judicial power even in the form in which it stood until recently amended. Still more clearly is it such an encroachment in its form as now reframed. The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within his breast to be with-

> held or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this court."

The opinion of Judge Cardozo might have been written for the case at bar. Judge Ryan had his counsel, assistant counsel and experts. He sought to follow trails of suspicion to uncover hidden wrongs, to build up a case as a prosecutor builds one. He did no more than the United States Attorney would have done.

The outstanding fact remains that it was an inquiry which could lead to no rule or sentence.

E. The investigation of crime is a Grand Jury function and not a Court function.

Another one of the declared purposes of the inquiry, was to investigate whether anybody assisted the defendants in the *Dennis* case to become fugitives (199-203). There was no limitation upon the scope of the inquiry or the number of persons to be called, nor was the inquiry directed the issuance of any order or determination. The only possible conclusion to the proceeding would be the gathering and development of information.

The inquiry may fairly be described in the words of Mr. Justice Holmes as a "fishing expedition * * * for the

chance that something discreditable might turn up" (*Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, 445), and a general investigation or inquisition is to be condemned on the same common-law and constitutional grounds as were general warrants and wide roving inquisitions by Royal Commissions of Enquiry, the Courts of High Commission and Star Chamber. (See May, *The Constitutional History of England,* (1880), ch. XI, p. 245, et seq.; 1 Cooley, *Constitutional Limitations,* ch. X, p. 612, n. 1; 1 *Story on the Constitution* (5th Ed. 1891), Secs. 1901, 1902; Chafee, *Freedom of Speech,* p. 298, et seq.)

In *Hale* v. *Henkel,* 201 U. S. 43, 63, the Court quoted the following from *Frisbie* v. *U. S.,* 157 U. S. 160:

> "But in this country it * * * is for the Grand Jury to investigate any alleged crime * * *."
>
> "The proceedings before a Grand Jury constitute the only general criminal investigation known to the law." (*Ward Baking Co.* v. *Western Union Telegraph Co.,* 205 App. Div. 727, 729.)*

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* The statute which had established the notorious Star Chamber (Act Pro Camera Stellata, 3 Hen. VII, c. 1 (1487)) provided for a general inquiry and represented an heroic method to cure a breakdown in the adminsitration of justice (1 Hallam's Const. Hist. of Eng. 69). But the remedy proved worse than the disease. The Star Chamber, with its general inquiries into indefinitely alleged offenses, had assumed an arbitrary character, and the abuses were many. The statute which abolished the Star Chamber (16 Chas. I, ch 10) graphically recited the abuses, as had other ancient sources. In the Mirror of Justices, whose date is uncertain, we find the following (Selden Soc. Ed.):

> "56. It is an abuse to make a man answer to the King's suit when he is not indicted or appealed.
>
> "64. It is an abuse to suffer judges to be plaintiffs for the King.
>
> "71. It is an abuse that a plaint should be received and heard when there are no suitors presented to testify that the plaint is true.
>
> "98. It is an abuse to summon a man without giving him reasonable notice of the matter about which he is to answer."

In *In re Oliver,* 333 U. S. 257, Justice Rutledge, concurring with the majority which found that the defendant had been adjudged guilty of a contempt of court without due process, said (278, 279):

> "Michigan's one-man grand jury as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petty jury. This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections, secured by the Sixth Amendment, namely, the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel for his defense. * * *
>
> "This aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common-law at the time our institutions crystallized in the Constitution. They are altogether at variance with our tradition and system of government, they cannot stand the test of constitutionality for purposes of depriving any person of life, liberty or property."

Judge Ryan's inquiry is an episode reminiscent of the ancient struggle between judges and grand juries. The grand jury system "took from the judges and other agents of the Crown the authority to inquire into and present all infamous offenses and those accused thereon." (*Ketcham* v. *Commonwealth* (1924), 204 Kent 168, 172-175. See also 12 R. C. L. 1013, 1038; Forsyth, *Trial by Jury* (1875), 184, 185. See also: Lord Coke, *The Commissions of Enquiry,*

1608, 12 Rep. 31; Bacon's *Discourse on the Commission of Bridewell,* 6 Works 514.)

These appellants have a standing to question the jurisdiction of the Court which deprived them of their constitutional liberties. The rule is clear and settled that orders made by a Court having no jurisdiction to make them may be disregarded without liability to process for contempt. (*In re Sawyer,* 124 U. S. 200; *Ex parte Fisk,* 113 U. S. 713; *Ex parte Rowland,* 104 U. S. 604.)

As this Court has often said and repeated in *In re Sawyer, supra*:

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void [citing cases]."

II

The decision below represents a departure from basic principles of constitutional and federal law established by decisions of this Court.

The Questions Asked Were Incriminating

The questions which the petitioners failed to answer fell into four distinct categories:—questions relating to production of their books and records; questions relating to the whereabouts of the fugitives; questions which sought to locate and identify the books and records; and questions as to what the books and records would reveal, more par-

ticularly, the names of the lenders and donors to the Bail Fund of the Civil Rights Congress.

The four fugitives were all members of the National Executive Committee of the Communist Party. The Civil Rights Congress, under whose sponsorship the Bail Fund was set up, has on numerous occasions been described as a "subversive" organization, as a "front" for the Communist Party and as part of a nationwide Communist conspiracy. Such charges have been given wide circulation, not merely by the newspapers, but by the Attorney General of the United States, Congressional committees and other investigating committees (Letters of Attorney General dated November 24, 1947; May 27, 1948; April 21, 1949; July 20, 1949; September 26, 1949; August 24, 1950 and September 5, 1950, pursuant to Executive Order No. 9, Report No. 1115, September 2, 1947, of House Committee on Un-American Activities; California Committee on Un-American Activities, Report 47; House Document 137, 82nd Congress, First Session [1951]).

Several months prior to the inquiry, Assistant Attorney General Whearoty stated that widespread prosecutions would be started under the Smith Act against thousands of "alleged" subversives. (Testimony before Special Committee of House Committee on Appropriations, January 12, 1950.)

Disclosure of knowledge as to whereabouts of the fugitives obviously might involve the petitioners in a violation of the Harboring Act (18 U. S. C. 1071, 1072) or conspiracy to violate the same.

The fear of prosecution was further heightened by Judge Ryan's statement that he was also investigating a possible contempt of Court in assisting or aiding the fugitives (200).

Evidence of association with the fugitives or with any so-called "front" organizations might easily, in these times of widespread use of conspiracy charges, involve the petitioners in charges of violation or conspiracy to violate espionage laws, sedition laws and laws respecting registration of foreign agents, etc.*

The petitioners were privileged to withhold testimony which not only might directly implicate them in a crime, but which might furnish a clue to their commission of a crime or a link in evidence which might tend to establish their guilt. The mere possibility that a response would supply such a clue or link sustains an assertion of the privilege (*Hoffman* v. *U. S.*, 341 U. S. 479; *Blau* v. *United States*, 345 U. S. 159; *Ballman v. Fagin*, 200 U. S. 186; *Counselman* v. *Hitchcock*, 142 U. S. 547; *U. S.* v. *Burr*, 25 Fed. Cas. No. 14692; *U. S.* v. *Weissman*, 111 Fed. 2nd 265; *U. S.* v. *Cousson*, 132 F. 2nd 413 (CA 2) and *U. S.* v. *Rosen*, 174 F. 2nd 187 (CA 2).

In *Hoffman* v. *U. S.*, 341 U. S. 479, this Court said (487-488):

> "• • • If the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responding answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

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* 18 U. S. C. 739, 799; 18 U. S. C. 951; 18 U. S. C. 1542, 1546; 18 U. S. C. 2381-2387; 18 U. S. C. 371; Internal Security Act of 1950, Pub. 831, 82nd Congress.

The foregoing principles have been applied from time immemorial to cases involving association with persons or groups who might be deemed subversive. In the very early case of *Rex* v. *Lord Gordon,* 2 Douglas Reports (KB) 590, 593, the report says:

> "A witness being asked, on the cross-examination, if he was a *Roman* Catholic, the question was objected to; and the court ruled that he was not obliged to answer it because if he were to say he was, his declaration would be evidence against him and might subject him to penalties."

As recently as *Blau* v. *U. S.,* 340 U. S. 159, this Court held answers to questions concerning affiliation or association with the Communist Party or its members are privileged. The same obviously applies to organizations deemed subversive or Communist fronts. (*Alexander* v. *U. S.,* 181 F. 2d 480, Cert. denied, 340 U. S. 920; *Kasinowitz* v. *U. S.,* 181 Fed. 2d 632, 649, Cert. denied, 340 U. S. 92; *Doran* v. *U. S.,* 181 Fed. 2d 439, C. A. 9, Cert. denied, 340 U. S. 290; *Estes* v. *Potter,* 183 Fed. 2d 865, Cert. denied, 340 U. S. 920.)

The Production of the Books and Records was Privileged Under the Fourth and Fifth Amendments

The Civil Rights Congress of New York, concerned with the protection of the rights of labor and of all civil liberties, sponsored the idea that there was need for a fund which was to be available for use as bail in cases involving the defense or protection of these rights.

Five citizens, Robert W. Dunn, Frederick V. Field, Abner Green, W. Alphaeus Hunton and Dashiell Hammett, calling themselves Trustees, signed an "Agreement and Deed of

Trust'' by which they agreed to receive gifts and loans of money or securities, without interest, of which they were to have sole and exclusive control and which they would make available for use as security by sureties on bail bonds in such cases.

They were not chartered by any governmental body or agency. They were not required to be so chartered, nor were they required to file any certificate to authorize them to act for the indicated purposes. They were not a corporate body, nor did they constitute an organization or association of any kind.

There were no statutory or administrative rules or regulations to which they were subject, and they were not representing any person or persons other than themselves.

When they signed the ''Agreement and Deed of Trust'', there was no ''trust res'' in being and no trust recognized by law (*Brown* v. *Spohr,* 87 App. Div. 522; aff'd 180 N. Y. 201; *Central Trust,* etc. v. *Gaffney,* 157 App. Div. 501; aff'd 215 N. Y. 740).

There were no principals and no members. They were not elected, appointed or chosen by any person or group of persons. They reported to no one. They acted for no stockholders, no members, and had no obligations except that of debtor with relation to those who loaned them money. They engaged in no business or trade or profession and did not, nor were they required to, keep or make any reports or accountings.

They were not required to keep books or records for or on behalf of anyone, except only for themselves, as they made their own rules and regulations for the operation of the Bail Fund. Nobody had a right of access to any books or records which they may have chosen to keep, and these

books and records were purely personal and not impersonal.

The Bail Fund had no personality aside from that of the Trustees, and their sole activity was confined to the single function of providing funds to sureties on bail bonds in cases which they, in their own judgment, deemed to be in defense of the rights of labor or of civil liberties.

In *Boyd* v. *United States,* 116 U. S. 616, this Court said (pp. 631-632):

> "[A]ny compulsory discovery by extorting the party's oath * * * to convict him of crime, or to forfeit his property, is contrary to the principles of a free government * * * [I]t is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In that case (transcript of record, Supreme Court of the United States, October Term, 1885, No. 983), Edward A. Boyd & Sons, a firm, had an agreement with the United States Government under which it was to supply glass and was permitted to import, duty-free, such amount of glass as it supplied.

The firm obtained a letter from the Government permitting 26 cases of glass to be imported duty-free. The United States Attorney for the Southern District of New York then began a proceeding *in rem* to declare these 26 cases of glass contraband on the ground that they were being imported under a false statement.

The firm denied the charge and filed a claim for the glass.

The United States Attorney then obtained an order, for use upon the trial, requiring Edward A. Boyd & Sons to produce the invoice sent to them by their shipper in England. The original invoice was not available and they agreed to produce, and did produce, a duplicate which was admitted into evidence over their objection.

This Court held that the introduction into evidence of the invoice violated the constitutional and statutory rights of the constituent members of Boyd & Sons under the Fourth and Fifth Amendments, saying:

> " * * * that the inspection by the District Attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the Court, were erroneous and unconstitutional proceedings."

In the examination of these petitioners, no testimony was adduced or produced to show that either of them kept or had any books or records concerning the Bail Fund, either in their possession or under their control. In no sense was possession, control or custodianship of such books and records established. Insofar as there was any reference to such documents, it came from sources with which these petitioners were not confronted, and which they could neither examine nor cross-examine.

The holding in the *Boyd* case directly controls the situation here presented, and the case of *United States* v. *White*, 322 U. S. 694, referred to in the Court below, has no application to the case at bar.

In the *White* case, a subpoena *duces tecum* was served upon an officer of a labor union, requiring the production of the union's books and records before a Grand Jury. Upon the return date, White appeared with the books. He testified that he was the "Assistant Supervisor" of

the union and that he had the required documents in his possession. He refused to produce them, however, upon the ground that they might tend to incriminate his union or himself, either as an officer or as an individual. In affirming the holding that White had no such privilege, and was guilty of contempt, this Court traced the development of labor unions as legal entities, structurally and functionally possessed of and endowed with the attributes of a legal and impersonal institution recognized in statute and practice. The Court said:

> "Structurally and functionally, a labor union is an institution which involves more than the private or personal interest of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union. The union's existence in fact, and for some purposes in law, is as perpetual as that of any corporation, not being dependent upon the life of any member. It normally operates under its own constitution, rules and by-laws which, in controversies between member and union, are often enforced by the courts. The union engages in a multitude of business and other official concerted acitvities, none of which can be said to be the private undertakings of the members. Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do; nor have they authority to act for the members in matters affecting only the individual rights of such members. The union owns separate real and personal property, even though the title may nominally be in the names of its members or trustees. The official union books and records of the individuals, in the same

manner as the union treasury exists apart from the private and personal funds of the members. See *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 534. And no member or officer has the right to use them for criminal purposes or for his purely private affairs. The actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question. At the same time, the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts. See *Lawlor* v. *Loewe*, 235 U. S. 522; *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275."

The Court took into consideration all of the statutes, practices and rules concerning labor organization and the public necessity for having reasonable regulations of their activities, and, even then, limited its holding in the case, saying (p. 698):

> "Our attention is directed solely to the right of an officer of a union to claim the privilege against self-incrimination under the circumstances here presented."

There is no resemblance between the circumstances in the *White* case and this case. Any similarity is more superficial than real.

The *White* case neither overruled nor diminished the holding of the *Boyd* case. In fact, Justice Murphy clearly and emphatically gave new vigor to the principles of the *Boyd* case when he cited it as an example of private and personal papers protected by the privilege of the Fifth Amendment (322 U. S. 694, 699).

Any extension of the doctrine of the *White* case to the case at bar would be a repudiation of the concern this Court expressed

> "* * * to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them (Fourth or Fifth Amendments) by imperceptible practices of courts or by well-intentioned but mistakenly overzealous executive officers" (*Gouled* v. *United States,* 255 U. S. 298, 304).

With respect to petitioner Hammett, there is still another distinction between his situation and the *White* case. He refused to testify as to any association with the Bail Fund.

In the case of *Blau* v. *United States,* 340 U. S. 159, the appellant was protected from answering questions as to her relationship to the Communist Party and also as to the whereabouts of its books and records.

Unlike the present situation, in all cases cited by Justice Murphy in the opinion in the *White* case, the custodianship of the desired records was admitted by the witness. Neither of the petitioners made such admission in this case. In fact, Hunton testified he did not know where they were.

The very basis of the *Boyd* and *Blau* cases is that the privilege against self-incrimination extends not only to the contents of the books, but to the very act of producing them. This is in line with the doctrine that the Constitution protects not merely those who refuse to give oral testimony, but embraces as well the furnishing, by any other means, of evidence which the accused has a right to hold secret. (28 *R. C. L.,* para. 20, p. 434.)

In any event, no person may be punished for contempt of Court for refusing to produce books and records which are neither in his possession nor under his control. (*U. S.*

v. *Bryan,* 339 U. S. 323, 330, 331; *U. S.* v. *American Tobacco Company,* 146 F. 557; *U. S.* v. *Jaeger,* 117 F. 2nd 483; *Fleming* v. *Northern Georgia Mfg. Co.,* 33 F. Supp. 1005; *Munroe* v. *U. S.* 216 F. 107; *In Re Sykes,* 23 Fed. Cas. 13707; *In Re Iron Clad Mfg. Co.,* 201 F. 66; *Russell* v. *McLellan,* 21 Fed. Cas. 12158; *In Re Hau,* 27 F. Supp. 480; *Commonwealth* v. *International Harvester Co.,* 148 Ky. 37.)

Questions Relating to Location of Books and Records

The Court below held that these questions were not privileged because they were "auxiliary to the production" of the book and records. Since the Court erred with respect to the applicability of the *White* case, it erred with respect to these questions also.

Independently of the Court's errors with respect to the *White* case, it erred when it held these were "auxiliary" questions. The only questions which have ever been held "auxiliary" and not subject to the privilege are those which concern themselves with authentication of books *already* produced. *United States* v. *Austin-Bagley Corp.,* 31 F. 2d 299, 234, certiorari denied *Austin-Bagley Corp.* v. *United States,* 279 U. S. 863; *Pulford* v. *United States,* 155 F. 2d 944, 947.

Judge Clark, who wrote the majority opinion in the case at bar which found these questions "auxiliary" and cited the *Austin-Bagley* case, took a very different view of that case in *U. S.* v. *Daisart Sportswear,* 169 F. 2d 856, 862, reversed on other grounds, *Smith* v. *United States,* 337 U. S. 137. He discussed the *Austin-Bagley* case, found it standing for the proposition only that a corporate officer may be forced to testify to the genuineness of corporate books and refused to extend its holding beyond that principle.

The distinction between authentication and location is real and substantial. Questions relating to the location of books and records assume their existence, knowledge of them, a certain amount of control over them, and their continued existence at the time of the questioning. Such questions not only lead to an association which is privileged, but at the same time might reveal facts which are incriminating in themselves.

Judge Clark, in his opinion in the *Daisart* case (*supra*) ruled against this very type of question and said (p. 862):

> "* * * (T)he very matter that would incriminate had to be forced from the lips of the defendant himself, rather than obtained from the records or books."

Questions Relating to the Contents of the Documents

The majority of the Court of Appeals took the position that these questions, and also questions concerning the whereabouts of the fugitives, were privileged. However, they held, as Judge Frank pointed out in his opinion:

> "The defendants bargained away the privilege many months before any judicial inquiry arose, when they voluntarily became sureties and thereby impliedly promised to disclose to the government any information which may aid in bringing into custody the convicted persons for whom the defendants (petitioners) had gone bail."

It is obvious—and important to consider—that the Court of Appeals proceeded on the erroneous assumption that these petitioners were "sureties" and "had gone bail". The fact is that the petitioners were not sureties, did not sign the recognizances, were not the bondsmen, and had

entered into no relationship or agreement with the Court, either in law or fact.

The only surety or bondsmen was Robert W. Dunn. When he appeared to post bail and presented the Federal Government Bearer Bonds, he was asked to justify under Rule 46e of the Federal Rules of Criminal Procedure. He then produced a copy of the "Agreement and Deed of Trust" and the affidavit.

Petitioners were not requested to and did not justify as sureties. They executed no recognizance. They assumed no obligations and received no attendant rights. They were not the "surety" who has the power to arrest a party admitted to bail (18 U. S. C. Sec. 3142). They did not appoint the clerk their agent for accepting service of papers. They needed, and could receive, no exoneration (Fed. Rules Crim. Proc., Rule 46f (3), g).

In *La Grotta* v. *U. S.*, 77 F. (2d) 673, 678, the Court said:

> "A bail bond is a contract between the government, on the one side, and the principal and surety on the other. United States v. Zarafanitis, et al., 150 F. 97, 80 C. C. A. 51 [10 Am. Cas. 290]; Kirk v. United States (C. C.), 131 F. 331. Like other contracts, it must be construed according to its express terms * * *."

Such contracts are always strictly construed (*Ewing* v. *U. S.*, 204 F. 241).

The "express terms" of the bonds in this case designate Robert W. Dunn as surety—and the only surety.

In *United States* v. *Pickett*, 27 Fed. Cas. 528 (No. 16,043), Pickett the accused, and Williamson, as surety,

executed a recognizance for Pickett's appearance. Some days later, Harding also signed the document; his name was not inserted in the body of the instrument. Upon Pickett's failure to appear, the Government sought to collect the bail from Harding. The Court denied the application and said:

> "It is clear that the recognizance entered into by Pickett and Williamson on the 9th of September, and certified by the justice, was a perfect and valid instrument. * * * Harding's name does not appear on the recognizance as one of the parties making the acknowledgment; and he is not otherwise connected with it than by the fact that he appeared on a subsequent date and put his name to it * * * without his name in the body of the instrument, his signature to the recognizance, at a subsequent day, did not make him a party to it, and thereby create a joint and several liability with the other parties * * *."

No one may be held to be a bondsman unless he executes a bond, and the bond he executes creates and limits the obligations he undertakes (*Ewing* v. *U. S.*, 204 F. 241). These petitioners executed no recognizance and undertook no obligations.

As far as the petitioners are concerned, it is clear that the proceedings against them present a case of confused or mistaken identity.

The Court was in Error Not Only With Respect to the Identity of the Surety, But Also With Respect to the Obligations of a Surety

We respectfully submit that the Court of Appeals was not only in error in treating petitioners as sureties on the

bonds in question, but was also in error as to the nature of the obligations undertaken by an actual surety.

We treat this point because it was injected into the proceedings by Judge Ryan and accepted as a pertinent question by the Court of Appeals.

In *Leary* v. *U. S.*, 224 U. S. 567, Mr. Justice Holmes said:

> "It is said that the bail contemplated by the Revised Statutes (Section 1014, U. S. Comp. Stat. 1901, p. 716) is common-law bail, and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the *mundiam,* although a trace of the old relation remains in the right to arrest. Rev. Stat., Sec. 1018. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for $40,000, that sum was the measure of the interest on anybody's part, and it did not matter to the Government what person ultimately felt the loss, so long as it had the obligation it was content to take."

In *Stack* v. *Boyle,* U. S. decided November 5, 1951, Chief Justice Vinson said:

> "Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture, serves as additional assurance of the presence of an accused * * *
>
> "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon

> standards relevant to the purposes of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant."

The sole authority for dealing with bail upon the non-appearance of defendants is found in Rule 46 of the Federal Rules of Criminal Procedure.

> "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable same escapes because it provided a procedure for dealing with them. Fed. Rules Crim. Proc. 46(f)" (Jackson, *J.*, concurring, *Stack* v. *Boyle, supra*).

Neither Rule 46, nor any other rule or decision, authorizes the calling of the person who may have supplied the surety with the money or the property he may have posted as bail. Nor do they provide for a "contract" to waive the privileges of the Fifth Amendment.

Waiver of the privilege against self-incrimination is an intentional act (*Smith* v. *United States,* 337 U. S. 137; *U. S.* v. *Weissman,* 111 F. 2d 265). The privilege does not exist unless there is a "real danger" to the witness (*Rogers* v. *U. S.,* 340 U. S. 367, 372). There can be no intelligent and conscious waiver of the constitutional privilege by acts in 1946 and 1948 as to a "real danger" which did not come into being until the *Dennis* case fugitives failed to appear in 1951.

In the case at bar, the surety's contract was satisfied. The recognizance contained no covenant to waive the privilege, for himself or any one else. There is no authority,

in history, statute or case, for the proposition that a contracting party may be examined to determine his ability to perform a contract already fulfilled.

Even a policeman who undertakes the contractual obligation to uphold the law has been held to be able to assert the privilege in an investigation of his conduct (*Christal* v. *Pol. Comm. of San Francisco,* 33 Cal. App. 2d, 564; *In Re Lemon,* 15 Cal. App. 2d, 82; *Drury* v. *Hurley,* 402 Ill. 243; *Scholl* v. *Bell,* 125 Ky. 750).

The surety in this case undertook only one obligation: to forfeit the bonds if the defendants failed to appear. The judge forfeited the bonds; he paid the penalty for the failure to appear; and he could not be held or charged with any further liability for breach of contract (*Ewing* v. *U. S.,* 204 F. 241; *Joelson* v. *U. S.,* 287 F. 106).

The rule with respect to the object of bail and the obligations of the surety has been concisely stated in 6 *American Jurisprudence* 112:

> "The object of requiring bail and the principal obligation thereof, is to secure the appearance of the accused so as to be present to answer the call of the court, submit to the prosecution of the charges that have been made against him, to do what the law may require of him. If this is done, the requirements of the bond have been answered. However, under modern rules, a surety on a bail bond or recognizance in a criminal case is regarded as a mere guarantor of the accused's appearance under risk of forfeiture of the penalty of the bond; a money security alone is contemplated, no legal duty to produce the accused being expressly laid upon the surety by instruction of the court, or by oath or otherwise."

Questions Relating to the Whereabouts of the Fugitives

The considerations expressed with respect to questions dealt with in the next preceding category apply to this category with equal force.

III

Error in the denial of the privilege as to any one of the categories of questions which form the grounds for the judgments requires a reversal of the convictions.

Where a conviction for several counts of contempt is reviewed, if the judge imposed only one sentence and any one of the grounds is found to be erroneous, the judgment must be reversed.

This differs from the rule in criminal cases which are founded upon several counts of an indictment or information (*Pinkerton* v. *United States,* 328 U. S. 640, 641, n1; *Hirabayashi* v. *United States,* 320 U. S. 81). In those cases, if one of the good grounds is sufficient to support the sentence, the sentence will not be disturbed.

The rule for contempt cases and applicable here was expressed by this Court in *Gompers* v. *Bucks Stove and Range Co.,* 221 U. S. 418. The Court of Appeals in that case had reviewed a judgment of contempt involving nine different grounds. It found the contemnors guilty of at least one of the acts and sustained the judgment on analagy to the rule in criminal cases. This Court said (p. 440):

> "That rule (of criminal cases) originated in cases where the finding of guilt was by the jury while the sentence was by the judge. In such cases the presumption is that the judge ignored the finding of the jury on the bad counts and sentenced only on those which were sufficient to sustain the conviction * * *

"Having found that each was guilty of these separate acts (of contempt) he (the trial judge) consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that having found them guilty of these nine specific acts he did not impose same punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction."

Judge Frank found error on Judge Ryan's part with respect to two of the categories of questions. But he overlooked the principle expressed in the *Gompers* case, and the majority of the Court said that the answer to the question presented by such a situation was not overclear.

CONCLUSION

The Writ of Certiorari should be issued and the judgment below reversed.

Respectfully submitted,

CHARLES ROTHENBERG
Attorney for Petitioners
25 Broad Street
New York 4, N. Y.

CHARLES HAYDON
Of Counsel for Petitioner Hammett

MARY M. KAUFMAN
Of Counsel for Petitioner Hunton